

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA GIBSON)	
Claimant)	
VS.)	
)	Docket No. 219,588
TERRACE GARDENS RETIREMENT CENTER)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY OF ILLINOIS)	
Insurance Carrier)	

TINA GIBSON)	
Claimant)	
VS.)	
)	Docket No. 227,578
DEPENDABLE ASSISTED LIVING, INC.)	
Respondent)	
AND)	
)	
TIG PREMIER INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent, Terrace Gardens Retirement Center, and its insurance carrier, Travelers Indemnity of Illinois (hereinafter Terrace Gardens), appeal from the October 23, 1997, preliminary hearing Order and the November 3, 1997, Order Nunc Pro Tunc entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge ordered respondent, Terrace Gardens, to pay claimant temporary total disability compensation for the period from April 30, 1997, until August 4, 1997. Terrace Gardens argues that claimant's need for those benefits does not result from her alleged work-related injury with Terrace Gardens, but instead is the result of a subsequent, intervening accident or accidents while claimant was employed with respondent Dependable Assisted Living (hereinafter Dependable).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing as follows:

The Appeals Board has jurisdiction over the parties and the issue raised by Terrace Gardens. The Administrative Law Judge consolidated two docketed claims for purposes of preliminary hearing. This was done at the request of claimant and without objection by either respondent. The Order from which this appeal was taken addresses both docketed claims although only one respondent was ordered to provide benefits to claimant. Where multiple accidents and/or docketed claims are consolidated for purposes of hearing and one order covers all of those claims, should any party appeal such an order the Appeals Board has jurisdiction over all of the claims and parties covered by such order.

The question of whether claimant's temporary total disability is the result of the alleged December 1996 accident at Terrace Gardens as opposed to the alleged subsequent series of accidents from March 15 or 25, 1997, through April 30, 1997, while claimant was employed with Dependable, gives rise to the question of whether the injury for which claimant is seeking benefits resulted from an accident which arose out of and in the course of her employment with Terrace Gardens. Thus, Terrace Gardens alleged an issue which is listed in K.S.A. 44-534a, as amended, as a jurisdictional issue.

The Appeals Board will review the finding by the Administrative Law Judge that Terrace Gardens should be responsible for the preliminary benefits ordered. In Docket No. 219,588 claimant alleges injury by accident at Terrace Gardens during December 1996. Although this accident is denied by the respondent, claimant was nevertheless furnished medical treatment at the expense of Terrace Gardens. Claimant was given certain work restrictions but, despite an offer of accommodated employment, claimant did not return to work for Terrace Gardens after December 1996. She eventually went to work for Dependable in March 1997. In Docket No. 227,578 claimant alleged injury by a series of accidents ending April 30, 1997. Dependable denies claimant suffered injury while in its employment and also denies notice. At the preliminary hearing, claimant, in effect, recanted her allegation that she was injured working for Dependable. She testified that even though her symptoms worsened while working for Dependable, her condition returned to about the level she had experienced while working for Terrace Gardens. In this manner, claimant attributed all of her problems to the December 1996 accident at Terrace Gardens.

The conclusion by the Administrative Law Judge that claimant's present condition is the result of her accident at Terrace Gardens and not the result of any subsequent, intervening injury rests largely upon the Administrative Law Judge's determination that claimant's version of events was believable. In assessing claimant's credibility, the Administrative Law Judge had the opportunity to personally observe claimant testify. For this reason, the Appeals Board gives some deference to the conclusion reached by the Administrative Law Judge concerning claimant's credibility. However, although there was no testimony from any witness which contradicted claimant's testimony, the medical records and reports introduced into evidence at the preliminary hearing support a different conclusion. The credibility of claimant's testimony is further impeached by statements she made to Dependable about her physical condition in her job application and at the time of hire.

The office notes and reports by Marshall K. Brown, D.O., and J. Mark Melhorn, M.D., do not support claimant's position on causation because they show a significant improvement in claimant's condition before her employment at Dependable and, further, show claimant with no physical limitations or work restrictions before beginning her job with Dependable. The record also contains records and reports from two subsequent treating doctors, George L. Lucas, M.D., and Thomas G. Wuller, M.D. None of these physicians attribute claimant's injury solely to the accident at Terrace Gardens; however, neither do any physicians give a specific opinion attributing the claimant's restrictions solely to her employment with Dependable. Claimant told Dr. Lucas in a letter dated April 17, 1997, that her symptoms had been aggravated "a lot" by her work with Dependable since being seen by Dr. Lucas on March 31, 1997. In that letter claimant attributed the recent increase in her symptoms solely to her work for Dependable. This evidence, coupled with the rest of the medical evidence, overcomes claimant's preliminary hearing testimony attributing her condition to her work at Terrace Gardens. Claimant testified that her symptoms had worsened while working for Dependable, and this prompted her to seek additional medical treatment. But, she also testified they were the same unresolved symptoms she had experienced following her injury at Terrace Gardens. Claimant did not explain the reason for not seeking follow-up treatment if her symptoms persisted after her release from treatment by Dr. Melhorn. She also testified that she was feeling better after being off work. Her symptoms did worsen in March 1997 and she was seen by Dr. Lucas but was given no restrictions except to avoid subluxation of her wrist by the continued use of wrist splints. She subsequently went to her personal physician, Dr. Brown, on her own on April 30, 1997, and was taken off work.

The Appeals Board finds from the record as it currently exists that the greater weight of the credible evidence establishes that claimant's subsequent injury at Dependable was the cause of the temporary disability for which she now seeks benefits.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order and Order Nunc Pro Tunc entered by Administrative Law Judge John D. Clark dated October 23, 1997, and November 3, 1997, respectively, should be,

and are hereby, reversed, and this matter is remanded to the Administrative Law Judge for a determination of claimant's entitlement to preliminary hearing benefits from Dependable in view of Dependable's alleged defense of no timely notice.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

c: Ryan Hodge, Wichita, KS
William L. Townsley III, Wichita, KS
Kirby A. Vernon, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director